

Bryan W. Shaw, Ph.D., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 16, 2013


Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: GORDON CLIFFORD SWENSON
TCEQ DOCKET NO. 2013-1488-SLG**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Motions to Overturn in the above-entitled matter.

Sincerely,


Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2013-1488-SLG

**IN RE: THE MOTION TO
OVERTURN THE EXECUTIVE
DIRECTOR'S APPROVAL OF
GORDON CLIFFORD
SWENSON'S REGISTRATION
NO. 710926 BY JAMES, AMY,
JIM, & JOANNE STORY; LOS
SENDAROS RANCH LTD;
EDDIE MOORE; CAL TAYLOR;
EVERGREEN UWCD; CITY OF
NIXON; AND GEORGE &
MARIA BLANCH**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
MOTION TO OVERTURN**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this *Response to the Motion to Overturn the Executive Director's Approval of Gordon Clifford Swenson's Registration No. 710926* in the above-referenced matter. OPIC respectfully shows the following.

The Motion to Overturn, (MTO) filed by James, Amy, Jim, & Joanne Story, Los Sendaros Ranch Ltd., Eddie Moore, Cal Taylor, Evergreen Underground Water Conservation District, the City of Nixon, and George & Maria Blanch (Movants) should be granted. Movants raise several issues that warrant further evaluation by the ED. OPIC asks that the Commission overturn the Applicant's registration and direct the ED to evaluate whether the Registration may be issued with additional notice and further water quality protections.

I. INTRODUCTION

On October 9, 2012, Gordon Clifford Swenson (Swenson or Applicant) applied to the TCEQ for an authorization for a beneficial land application of domestic septage at a rate not to exceed 76,923 gallons per acre per year on approximately 179.4 acres within approximately 401.63 acres. The proposed land application site is located on Country Road 483, about 8,900 feet south of the intersection of U.S. Highway 97 and South Ranch Road in Nixon County, Texas 78140.

The application was found administratively complete on November 14, 2012 and the Notice of Receipt of Application and Declaration of Administrative Completeness (NORI) was mailed on November 21, 2013. On November 30, 2012, an Amended NORI was mailed out, to account for Swenson requesting to increase the beneficial land application area from 179.4 acres to approximately 298.9 acres. On March 28, 2013, a Public Meeting was held at the Wilson County Sherriff's Office in Floresville, Texas, and the public comment period ended on March 28, 2012. TCEQ received 76 written comments during the comment period, 18 people provided oral comments at the public meeting, and 311 people signed a petition opposing the application. On July 19, 2013, TCEQ issued Registration No. 710926 (Registration) to Swenson.

The TCEQ received four requests to overturn the Registration. On August 12, 2013, Anne M. Wagner, requested that the Registration be overturned, as did Mario Berma on August 14, 2013. On August 16, 2013, James, Amy, Jim, & Joanne Story, Los Sendaros Ranch Ltd., Eddie Moore, Cal Taylor, Evergreen Underground Water Conservation District, the City of Nixon, and George & Maria Blanch (Movants) filed a

motion to overturn the ED's decision to grant the registration. The Wilson County Commissioners Court, in a letter to the Commission on August 19, 2013, also requests that the decision be reversed.

TCEQ also received one letter from a state official in opposition of the Registration. State Representative John Kumpel, on April 5, 2013, voiced his opposition to the Registration on behalf of his constituents.

In a letter dated September 4, 2013, the General Counsel of the TCEQ extended the Commission's deadline to act on the Movant's motion, and requested briefing on the issues raised in the motion.

II. APPLICABLE LAW

The land application of domestic septage is governed by Chapter 312 of Texas Administrative Code (TAC).¹ Domestic septage is defined as:

Either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap.

Applicants seeking to land apply seepage must obtain a registration from the TCEQ.²

¹ 30 TAC §§ 312.1, 312.2(d).

² 30 TAC §§ 312.4(c)(1), 312.10(g).

III. DISCUSSION

As an initial matter, all of the motions to overturn the Registration are timely under 30 TAC § 50.139(b). An applicant must file its motion with the Chief Clerk no later than 23 days after the agency mails the decision. As the 23rd day fell on Sunday, all motions filed by the next business day, Monday, August 19, 2013, are considered timely.

A. Issues Raised by Movants

Movants have raised numerous specific issues in their motion to overturn the registration. OPIC finds that several issues raised have merit, and warrant further evaluation by the ED. First, Movants contend that the Registration contains a land application limit exceeding the ability of the groundcover to absorb nutrients. If the groundcover is unable to absorb the nutrients in the septage, those nutrients remain available for seepage into the groundwater or nearby surface water bodies. Second, Movants have raised several deficiencies within the application. Third, Movants argue the application omits several parcels of land owned by the Applicant and required by TCEQ rule to be included in the Landowner Property Boundary Map. Finally, Movants argue that there are inconsistencies within the Application maps, making it unclear where the land application area is located.

OPIC finds these concerns have merit, and warrant overturning the registration and remanding the matter back to the ED for further evaluation, per 30 TAC § 50.139(d).

1. The Land Application Rate may be set too high, leading to ground and surface water seepage

TCEQ regulations set limits on the amount of septage that may be land applied to an area:

“Domestic Septage. The annual application rate for domestic septage applied to agricultural land, forest, or a reclamation site shall be equal to or less than the annual application rate calculated using equation 1. $AAR = N / 0.0026$, where AAR = Annual application rate in gallons per acre per 365-day period; N = Amount of nitrogen in pounds per acre per 365-day period needed by the crop or vegetation grown on the land.” 30 TAC § 312.43(c).

Movants argue that the AAR for this project is too high. The registration allows the Applicant to apply 76,923 gallons/acre/year. Movants have broken this number out to determine that the corresponding application per 48-hour period would be about 422 gallons/acre/48 hours. However the Registration, under Subsection C of the Special Provisions of the Registration states that the application limit for a 48 hour period is 6,800 gallons/acre/48 hours. Movants correctly note that the Registration's 48 hour limit is roughly 16 times what the average yearly limit would be. They believe that the 48 hour limit could lead to application in excess of the plants' ability to absorb nutrients in the septage. Those nutrients not absorbed by the plants would then be available for seepage into ground and surface water.

The rule governing AAR for septage contains a yearly standard, not a 48 hour standard. However the Applicant must apply septage “by a method and under conditions that prevent runoff of sewage sludge beyond the active application area and protect the quality of the surface water and the soils in the unsaturated zone.” 30 TAC § 312.44(h). Based on the information available in the record, OPIC is unable to

determine whether the 48 hour limit is low enough to ensure that the land application will be conducted in a manner that prevents runoff and is protective of water quality.

Therefore OPIC requests that this registration be overturned and remanded to the ED for further review and explanation accompanying any subsequent decision on the registration as to whether the annual and 48-hour AAR comply with 30 TAC § 312.44(h).

2. The Application is missing necessary information

Movants argues that the Application is missing information necessary to determine whether the land application project will comply with TCEQ rules. OPIC agrees.

Page 17 of 20 of the Application submitted on October 9, 2012, contains a chart for the Applicant to include soil data. The chart requires the Applicant to include data on the pH, depth to groundwater, and depth to bedrock. There is also a place for an applicant to specify the data source and who completed the soil data. The Application is silent on all of these subjects.

The lack of information on the depth of groundwater below this site forecloses OPIC from determining whether the application complies with TCEQ groundwater protection measures for land applications.³ Further, OPIC questions the reliability of the soil data represented in the chart, as the Applicant has not stated the source of the data or who completed the data, as required in the application.

³ 30 TAC § 312.44(g).

3. The landowner map may omit several parcels of Applicant's property

Movants argue the application omits several adjacent parcels of land owned by the Applicant and required by TCEQ rule to be included in the Landowner Property Boundary Map.

A permit application must include, among other information, the "map required by §305.45(a)(6)...that provides the following information: (A) the approximate boundaries of the site to be permitted, which must include all contiguous properties owned by or under the control of the applicant."⁴ The map must also include

"the name and mailing address of the owner of each tract of land located...adjacent to the site to be permitted, as such information can be determined from the current county tax rolls or other reliable sources, at the time the application is filed for a domestic septage or Class A sewage sludge beneficial use land application, or sewage sludge processing or storage facility."⁵

If the boundary of the site to be permitted is incorrect because the Applicant did not include all contiguous properties, then the list of adjacent property owners may be incomplete. As this list is used to send out notice of the proposed registration as required by 30 TAC § 312.13(c)(3), an omission of this sort may have led to insufficient notice. If notice was not properly given to all adjacent landowners, this could impact the validity of the registration.

Based on the information included in the application, issued Registration, and Movantss motion, OPIC cannot determine the validity of the Movants claim. However, OPIC recommends this Registration be overturned for other reasons. If the Commission directs the ED to evaluate whether this registration may be issued with

⁴ 30 TAC § 312.11(c)(1).

⁵ 30 TAC § 312.11(c)(1)(B)(iii).

modifications, the issue of whether notice was sufficient should also be evaluated.⁶

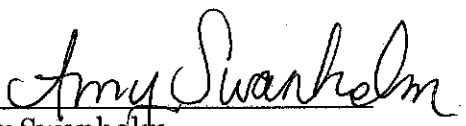
Therefore OPIC asks that the registration be overturned and remanded to the ED for further review as to whether the application map and landowner list had properly characterized the extend of the Applicant's property and included all adjacent landowners.

IV. RECOMMENDATION

Movants have raised several issues that warrant further evaluation by the ED. OPIC asks that the Commission overturn the Applicant's registration and direct the ED to evaluate whether the Registration may be issued with additional notice and further water quality protections.

Respectfully submitted,


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⁶ OPIC may reevaluate this position based in information submitted in other parties' briefs.

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2013 the original of the foregoing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, other electronic transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Amy Swanholm

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